TRANSMISSION TECHNOLOGY SDN BHD v. PESB ENGINEERING SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, JOHOR BAHRU
MOHD IVAN HUSSEIN JC
[ORIGINATING SUMMONS NO: JA-24C-03-08-2017 & JA-24C-04-08-2017]
12 MARCH 2018

CONSTRUCTION LAW: *Adjudication – Setting aside – Grounds – Whether adjudicator acted in excess of jurisdiction – Whether there was denial of justice – Whether payment claims were in respect of works under same project – Whether plaintiff shown denial of opportunity to be heard – Whether plaintiff allowed to render written response to adjudication response – Whether matters raised within scope of s. 15 of Construction Industry Payment and Adjudication Act 2012*

The plaintiff ('TT') appointed the defendant ('PESB') as its sub-contractor to undertake a construction work. When payment disputes arose, PESB initiated adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') against TT which was decided in favour of PESB. The adjudication proceedings was for the sum of RM1,027,454.01, out of which a sum of RM607,707.12 had been awarded to PESB under the adjudication decision. TT applied to set aside the decision pursuant to s. 15(b) and (d) of the CIPAA ('TT's OS') on the grounds that: (i) the adjudicator had acted in excess of his jurisdiction; and (ii) there was a denial of natural justice, said to have arisen from the following: (a) the adjudicator had disallowed TT to respond to the adjudication response; (b) additional costs for the soft ground access had been allowed; (c) rental costs of an excavator had not been allowed; and (d) rejection of TT's claim for liquidated ascertained damages ('LAD'). On the other hand, PESB had applied to enforce the adjudication decision as a judgment or order of the High Court ('PESB's OS').

Held (allowing OS by PESB; dismissing OS by TT):

(1) Anything that had been put up for adjudication would be contained in the payment claim under s. 5 of the CIPAA and the payment response required under s. 6 would address such claim accordingly for the adjudication to proceed accordingly. The adjudication procedure is, in general, less rigid as it was intended to allow the parties to ventilate their cases with wider latitude than they would otherwise be able to in a civil court. Unless the plaintiff was able to show that it had been denied any opportunity to be heard by the adjudicator as a direct consequence of not being allowed to render a written response to the adjudication response, that objection would not be sustainable. That did not seem to be the case here. (paras 22, 25 & 26)

(2) The contention that the adjudicator had allowed additional costs for the soft ground access, and had disallowed rental costs of an excavator, were matters within the ambit and parameters of the adjudication, and did not detract from the purpose of the exercise. Whether the adjudicator was right in his decision would be condescending into reviewing the merits of the adjudication which would be outside the scope of s. 15 of the CIPAA. (paras 29 & 30)

(3) The point that needs to be emphasised in a payment claim is that invariably work had been done, where the physical aspects, such as, purchase of materials and labour had been expended. This has generated a payment claim. For a respondent to argue that it need not pay for the work done would be the antithesis of the objectives of the CIPAA, and must be regarded with great circumspect. (para 33)

(4) In the context of the introduction of the CIPAA, the issue of LAD will generally be too contentious for an adjudicator to be able to deal with during adjudication proceedings as it would involve applications for extension of time by any contractor or sub-contractor. This will generally be a lengthy process which may go beyond the particular payment claims up for adjudication, and hinder disposal within the timelines imposed by the CIPAA. If the LAD issue was mandated to be taken up during adjudication proceedings under the CIPAA, there will be no need for temporary finality where there will be little or nothing to differentiate adjudication from arbitration. As such, any refusal by an arbitrator to deal with the issue of LAD especially by way of set-off against a payment claim, by itself does not amount to a denial of natural justice. The opportunity will not be lost forever, as there will be a more appropriate time and forum to do so, usually at the end of the project. (paras 34 & 35)

(5) As long as the utility of adjudication under the CIPAA resonates with the construction industry and its procedure is not avoided, or rejected by a non-paying party once it is initiated, the court will be slow to interfere in the decisions arrived after due process by adjudicators unless there is a clear case to be made out under s. 15 of the CIPAA. In the circumstances, the adjudication decision need not be set aside. The originating summons of TT for the setting aside the adjudication decision was dismissed with costs. The originating summons of PESB for the adjudication decision to be enforced by entry as a judgment of the High Court was allowed. (paras 40- 43)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] 1 LNS 1522 CA ***(refd)***

Carillion Construction Limited v. Devonport Royal Dockyard Limited [2005] EWHC 778 ***(refd)***

Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases [2015] 1 LNS 1435 HC ***(refd)***

Syarikat Bina Darul Aman Bhd & Anor v. Government of Malaysia [2018] 4 CLJ 248 HC ***(refd)***

Tidalmarine Engineering Sdn Bhd v. Conlay Construction Sdn Bhd & Another Case [2018] 2 CLJ 376 HC ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2015] MLJU 695 ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 5(1), 6, 12(9), 15(b), (d), 27(1)

For the appellant - M/s Amrit & Co
For the respondent - M/s Azman Davidson & Co

Reported by S Barathi

JUDGMENT

Mohd Ivan Hussein JC:

[1] The plaintiff ("TT") had appointed the defendant ("PESB") as its sub-contractor to undertake works described as "Kerja-kerja Increase Height of TNB Overhead Transmission Line at Tg Bin Development Area".

[2] After payment disputes had arisen, PESB had initiated adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") against TT.

[3] A decision had been delivered on 11 July 2017 in favour of PESB, which TT is applying to set aside herein.

[4] PESB has also filed an Originating Summons No: JA-24C-4-08-2017 against TT to enforce the adjudication decision as a judgment or order of the High Court.

[5] The outcome of TT's application herein would pretty much determine the outcome of the said originating summons filed by PESB.

[6] TT's application to set aside an adjudication decision was made pursuant to s. 15(b) and (d) of the CIPAA.

[7] PESB had been appointed under a letter of award dated 8 July 2015. Earlier, TT had also issued a letter dated 10 June 2015 in relation to the said works.

[8] The completion date for the works was 31 October 2015, but PESB had supposedly completed late on 21 January 2016.

[9] TT claimed to have appointed a third party contractor to complete the works.

[10] The adjudication proceedings commenced by PESB was for the sum of RM1,027,454.01, out of which a sum of RM607,707.12 had been awarded to PESB under the adjudication decision.

[11] Adjudication and legal costs were also awarded against TT, and its counterclaim was wholly dismissed.

[12] In the plaintiff's submission to set aside the adjudicator's decision, the following complaints were raised:

(a) The adjudicator had acted in excess of his jurisdiction, and

(b) There was a denial of natural justice.

[13] On the issue of excess of jurisdiction, the plaintiff had contended that the defendant's payment claim had been made with reference to the plaintiff's letter dated 10 June 2015 as well as a letter of award dated 6 July 2015.

[14] As s. 5(1) of the CIPAA had referred to "... a construction contract", the adjudicator had seemingly acted in excess of his jurisdiction by proceeding with an adjudication in respect of two contracts.

[15] Although two letters may have been in play, both had been in relation to the same project and referring to the same works.

[16] The defendant had referred to a book on *Construction Law* written by Julian Bailey where the following was quoted therefrom:

> Construction and engineering contracts are generally (i.e. at common law) not required by Law to be in writing. Nor, if they were in writing, are they required to be signed. It is sufficient if the parties have conducted themselves as if their relationship was governed by particular terms and conditions. Nor, should the parties choose to enter into a written contract, are the parties required to embody all of the contract terms in a single document. Terms may be contained in a number of documents which, taken together, constitute the agreement between the parties.

[17] I would tend to agree that a broader view needs to be taken, especially if parties had seemed to know what they were talking about in the adjudication process, where no one appeared to be disadvantaged in any way.

[18] Section 27(1) of the CIPAA, taken in relation to ss. 5 and 6, should set the parameters of the adjudication, where if it can be shown that neither party was labouring under any ambiguity or misapprehension, and no objection had been taken arising therefrom, then there should not be an after-the-fact issue taken under a s. 15 application later.

[19] Here, the payment claims were in respect of works under the same project.

[20] The denial of natural justice was said to have arisen out of the following:

(a) The adjudicator had disallowed the plaintiff to respond to the adjudication response,

(b) Additional costs for the soft ground access had been allowed,

(c) Rental costs of an excavator had not been allowed,

(d) The plaintiff's claim for liquidated ascertained damages had been rejected.

[21] What would constitute denial of natural justice was alluded to in the case of *Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases* [2015] 1 LNS 1435 in particular to para. 92 as follows:

> [92] In order for there to have been a denial of natural justice by the Adjudicator, Tioxide must show *inter alia*:
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> a) that the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to have been given the opportunity to comment upon if decisive or of considerable potential importance to the outcome of the resolution;
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> b) that the adjudicator has gone off on a frolic of his own, ie, deciding a case based on a factual or legal basis which has not been argued or put forward by either side;
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> c) that the adjudicator has decided on an issue or issues outside his jurisdiction;
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> d) that the adjudicator deliberately took an erroneously restrictive view of his own jurisdiction with the result that he decides not to consider an important or material element of the dispute referred to him.

[22] Whatever had been put up for adjudication would be contained in the payment claim under s. 5 of the CIPAA, and the payment response required under s. 6 will address such claim accordingly for the adjudication to proceed accordingly.

[23] Although it has been said in the case of *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 that the payment claim and the payment response are to adjudication what pleadings are to civil litigation, it would be quite unlikely for adjudicators (who need not be legally qualified) to insist that parties be bound by their "pleadings" in an adjudication exercise.

[24] The Court of Appeal in *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] 1 LNS 1522 had referred to the decision of the Court of Appeal in *Carillion Construction Limited v. Devonport Royal Dockyard Limited* [2005] EWHC 778 where at paras. 85 and 86 of the judgment, the court said:

> [85] The objective which underlies the Act and the statutory scheme requires the Courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to the DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment."
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> [86] It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels of "excess of jurisdiction or "breach of natural justice. *It must be kept in mind that the majority of the adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge.* The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.
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> [87] In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly. (emphasis added)

[25] The adjudication procedure is generally less rigid, as it was intended to be so to allow parties to ventilate their cases with a wider latitude than they would otherwise be able to in a civil court.

[26] Unless the plaintiff is able to show that it had been denied any opportunity to be heard by the adjudicator as a direct consequence of not being allowed to render a written response to the adjudication response, that objection would not be sustainable. That did not seem to be the case here.

[27] In an adjudication process, whatever raised by either party can surely be answered in the course of the proceedings as strict adherence to principles that a party is bound by its "pleadings" are not mandated, and neither is the Evidence Act 1950 applicable (see: s. 12(9) of the CIPAA).

[28] The reality that parties have actually much more freedom and opportunity to ventilate their stated case in adjudication proceedings would greatly diminish against any complaints that may be raised that their right to present their case had been curtailed procedurally.

[29] The contention that the adjudicator had allowed additional costs for the soft ground access, and had disallowed rental costs of an excavator, were matters within the ambit and parameters of the adjudication, and did not detract from the purpose of the exercise.

[30] Whether the adjudicator was right in his decision would be condescending into reviewing the merits of the adjudication, which would be outside the scope of s. 15 of the CIPAA.

[31] The case of *Syarikat Bina Darul Aman Berhad & Anor v. Government of Malaysia* [2018] 4 CLJ 248; [2017] MLJU 673 had addressed this point as follows:

> [60] The Adjudicator having made a finding of mixed fact and law, it is not for this Court to interfere on merits. This is not an appeal and the Adjudicator having applied his mind to the clauses before him and the documents, have come to a decision which he is entitled to. It is a decision of temporary finality and it will be overtaken by the award in the Arbitration if the Claimant in the Arbitration to be commenced is able to persuade the Arbitrator that the Adjudicator had made a wrong finding of mixed law and fact. It is not for this Court to enter into the realm of sufficiency of evidence with respect to the findings arrived at unless there is clear evidence of a lack of independence or impartiality which is not the ground relied on by the Claimant to set aside the Decision. There is also no evidence of a breach of natural justice in the Adjudicator arriving at his Decision to dismiss this head of Claim for he heard both sides before arriving at his Decision.

[32] In coming to the plaintiff's counterclaim for LAD, the words of May LJ in *PegramShopfitters Ltd v. TallyWeijl (UK) Ltd* do ring true, which can be found quoted in the case of *UDA Holdings Berhad v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527; [2015] 11 MLJ 499 as follows:

> [133] Here, I am once again reminded of what May LJ said in *Pegram Shopfitters Ltd v. Tally Weijl (UK) Ltd* of how it is in the nature of construction contracts to 'generate disputes about payment'. *Where there are 'delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due*'. This diametrically opposing stance unfortunately, does no one any good; including for instance the innocent purchaser of the property; or the owner of the property being developed. This impasse was recognised as stifling the lifeblood of the industry that policy intervention through legislation was seen fit. CIPAA is intended to provide an intervening provisional decision or 'a temporary balance … in appropriate circumstances … in favour of those who claim payment, at the temporary expense if necessary of those who pay'. These adjudication decisions, 'being quick and dirty', also 'provide a quick enforceable interim decision under the rubric of 'pay now, argue later', are necessary so as to give 'life' back to the enterprise or underlying contract which had reached an impasse or stalemate. It is in the very nature of the scheme or mechanism that the substantive issues relating to the payment can still be argued at a later point; or taken concurrently at separate proceedings initiated in court or at arbitration. (emphasis added)

[33] The point that needs to be emphasised in a payment claim is that invariably, work had been done, where the physical aspects such as purchase of materials and labour have been expended. This has then generated a payment claim. For a respondent to argue that it need not pay for the work done will be the antithesis of the objectives of CIPAA, and must be regarded with great circumspect.

[34] Understandably so in the context of the introduction of CIPAA, the issue of LAD will generally be too contentious for an adjudicator to be able to deal with during adjudication proceedings as it will involve applications for extension of time by any contractor or sub-contractor. This will generally be a lengthy process which may go beyond the particular payment claims up for adjudication, and hinder disposal within the timelines imposed by CIPAA. Also, if the LAD issue is mandated to be taken up during adjudication proceedings under CIPAA, there will be no need for temporary finality where there will be little or nothing to differentiate adjudication from arbitration.

[35] As such, any refusal by an arbitrator to deal with the issue of LAD especially by way of set-off against a payment claim, by itself, does not amount to a denial of natural justice. The opportunity will not be lost forever, as there will be a more appropriate time and forum to do so usually at the end of the project.

[36] To consider CIPAA as a new legislation may no longer hold, as much have been written on the scope and intent of CIPAA such that little or nothing more needs to be added.

[37] It ought to be recognised and accepted for what it is, without trying to draw parallels with the Rules of Court 2012 and over compartmentalising its provisions to fit into something which CIPAA was never intended for. In short, it should be allowed to be applied in the spirit for which it was created, and to do its work with all the stakeholders playing their respective roles.

[38] In *Tidalmarine Engineering Sdn Bhd v. Conlay Construction Sdn Bhd & Another Case* [2018] 2 CLJ 376; [2017] MLJU 738, the following had been expressed:

> It might be opportune to observe here that there is a need to restrain from converting the Adjudication Proceedings into a full-blown litigation proceedings in a Court.
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> The intention of Parliament was to make the procedure and proceedings in Adjudication as simple as possible and to ensure that it, being a speedy mechanism to dissolve disputes that has only the effect of temporary finality, does not become unduly convoluted and cumbersome. This can be seen in the fact that under section 8(3) CIPAA a party to the adjudication proceedings may represent himself or be represented by any representative appointed by the party.
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> One must bear in mind that it is not every breach of natural justice that would result in the setting aside of the Adjudication Decision.
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> The Respondent bears the burden of showing that the alleged breach of natural justice was material in order for the Court to exercise its discretion to set aside the Adjudication Decision. As was aptly observed in the case of *ACFM (supra)* where the High Court held at pp 9-10 that:
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> > [53] ... It is not simply any breach or denial which will forestall the enforceability of the adjudication decision or be a ground for setting aside that decision. The breach must be "either **decisive or of considerable potential importance to the outcome and not peripheral or irrelevant; it must be material.** ... (emphasis added)

Such was the view expressed in the case of *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 at p. 10, para. 94.

A **[39]** Suffice to say, it is simply an alternative procedure introduced to facilitate expediency where rough justice and temporary finality have been the catchphrases often used.

[40] As long as the utility of adjudication under CIPAA resonates with the construction industry and its procedure is not avoided, or rejected by a non-
B paying party once it is initiated, the court will be slow to interfere in the decisions arrived at after due process by adjudicators unless there is a clear case to be made out under s. 15 of the CIPAA.

[41] Guided by the submissions, I am not satisfied that the adjudication decision here needs to be set aside.
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[42] In the circumstances, the originating summons of TT for the setting aside the adjudication decision is dismissed with costs of RM4,000 subject to allocator to be paid by TT to PESB.

[43] Consequently, the originating summons of PESB for the adjudication
D decision to be enforced by entry as a judgment of the High Court is hereby allowed with costs of RM4,000 subject to allocator to be paid by TT to PESB.

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